IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

FIRST APPEAL NO. 610 OF 2004

Sou. Usha Mangesh Chandorkar ... Appellant

V/s

Shri Mangesh Laxman Chandorkar ... Respondent

Shri A.S. Khandeparkar with Shri S.D. Raje for the appellant.

Shri C.G. Gavnekar for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 29TH SEPT., 2004.

P.C.:

1. Heard learned counsel for both parties.

2. Rule. Rule made returnable forthwith by consent.

3. This appeal is preferred against the judgment and order dated 6.1.2004 passed by the District Judge, Raigad-Alibag in Civil Misc. Application No. 119 of 2001 deciding the question of custody of the child and appointment of guardian of the child in favour of the respondent.

4. The marriage between the parties was solemnized in the month of May, 1997 at Shriwardhan. The first issue was born within one year of the marriage. The delivery took place at Vile at the parental house of the appellant. For want of medical treatment, the first issue died and thereafter the second issue was born i.e. Mayur, on 18.3.2000. There was discord in the marriage subsequently as a result of which the couple separated on 28.6.2001 and appellant went to her parental home. She filed Cri. Misc. Application No. 9 of 2001 under Sec. 91 of the Cr.P.C. seeking custody of the child and she succeeded in getting custody of Mayur on 6.7.2001. Since then Mayur was staying with the appellant. The respondent filed revision application in the Sessions Court at Alibag. It was dismissed. On this back ground, the present proceeding was filed on the ground that the child was sick and was not getting proper medical attendance at village Vile with his mother. It was also alleged that the appellant was incapable of taking care of child and, therefore, custody of the child was sought for in the said proceeding. The appellant filed the written statement but failed to remain present at the time of hearing of the matter, as a result of which, the proceeding was heard in the absence of the appellant and was

adjudicated against her holding that the respondent was appointed as guardian of person of Mayur and was also held entitled to custody of Mayur. The appellant was directed to transfer the custody of Mayur to Mangesh, the respondent. Hence, the present appeal is filed.

As on today, the child is still with the appellant mother due to the stay issued by this Court.

5. After hearing both parties, it is quite apparent that the learned Trial Judge granted custody of Mayur to the respondent mainly on the ground that Mayur is not in a position to get medical treatment at village Vile which is far away from Mahad where medical practitioner is available for medical treatment. The appellant is resident of Vile by virtue of the fact that her parents are residing there and village Vile is located in Tal. Mangaon, Dist. Raigad, whereas the respondent is resident of Shriwardhan. The learned Trial Judge has observed that Usha is staying at Vile with Mayur which is far from Mangaon and it is quite natural that Mayur will not get proper treatment at village Vile. I prefer to disagree with this proposition for simple reason that town of Shriwardhan and village Vile in Tal. Mangaon are both places which are in the periphery of about

50-60 kms. from Mahad where medical treatment is available. Therefore, it cannot be said that child staying at Vile would be at disadvantage than the child staying at Shriwardhan so far as medical treatment at Mahad is concerned. Be as it may, the fact remains that the present appellant did not remain present for hearing of the matter and, therefore, obviously, the learned Trial Judge had to accept the contentions raised by the present respondent while passing the order.

In this regard, it must be noted that the child's welfare is of paramount consideration and, therefore, in my view, the appellant must get fair opportunity to participate in the adjudication on merits regarding custody of the child especially when it is evident that the child is below the age of five years and, therefore, mother's care is the basic need for the child of such age. Under the circumstances, I am inclined to remit the matter back to the Trial Court for adjudication afresh on merits.

Hence, the appeal is allowed. The order dated 6.1.2004 passed by the District Judge, Raigad-Alibat is hereby set aside.

The matter is remitted back to the learned District Judge, Raigad-Alibag for adjudication afresh. He shall issue notice to both parties of date of hearing and after giving them opportunity to lead evidence, decide the relevant issues on merits within six months from the date of receipt of this order. Needless to mention that the child shall remain in appellant’s custody pending the dispute.

With this direction, the appeal stands disposed with no order as to costs.

It is clarified that the respondent shall get opportunity to approach the lower Court for the purpose of seeking access to the child as per the mutual convenience of both parties.

It is further clarified that the observations made hereinabove shall not in any way influence the adjudication of the application on merits.

Parties shall appear before the District Judge, Raigad-Alibag on 25th October, 2004 and the learned District Judge thereafter shall give appropriate date for hearing of the application on merits according to

law.

C. c. expedited.

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